

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

038

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,177

GODFREY P. SCHMIDT,
Appellant,

v.

JOSEPH S. McCARTHY,
SEYMOUR J. SPELMAN,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED 11/11/1967

Nathan D. Paulson
CLERK

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N.W.
Washington, D.C.
Attorney for Appellant

(i)

QUESTION PRESENTED

Did the Court err in denying appellant's motion for judgment?

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Godfrey P. Schmidt from a judgment in favor of the appellees, Seymour J. Spelman and Joseph S. McCarthy, and reference hereafter as to any party will be to their surname only.

The original action, out of which the present appeal became necessary, was commenced on March 22, 1963, by a complaint filed in Civil Action No. 772-63, by McCarthy and Spelman for counsel

fees and expenses in the amount of \$15,000.00 as compensation for their services in allegedly making available to Schmidt a fund in contemplation of *Sprague v. Ticonic National Bank*.

An attachment before judgment was filed with the complaint and the sum of \$15,000.00 belonging to Schmidt was attached and held pending a final judgment.

A judgment was entered against Schmidt by the trial Court in favor of Spelman and McCarthy in the sum of \$15,000.00, which was reversed by this Court in case No. 18617 on July 21, 1966, and which, as yet, has not been reported in U.S. Appeals, D.C. Reports.

A final judgment in favor of Schmidt was entered in the United States District Court for the District of Columbia on November 23, 1966, on the mandate of this Court.

Schmidt, in that cause, filed a motion for judgment for damages for the amount of interest due for the period of time the proceedings were in progress for the wrongful attachment of his funds. The Trial Court denied Schmidt's motion for judgment and judgment was entered in favor of Spelman and McCarthy (JA 31).

Jurisdiction was conferred on the District Court by the provisions of Section 306, Title 11 of the 1961 Edition of the Code of the District of Columbia, and on this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

On March 22, 1963, Spelman and McCarthy filed a complaint against Schmidt, in Civil Action No. 772-63, for attorneys' fees and costs growing out of their alleged legal services in the case of *Milone v. English*, this Court No. 16348, which they contended was beneficial to Schmidt in that he would not have received the fees allowed by Judge Matthews had they not reversed the action of Judge Letts in that case.

At the time of the filing of the complaint they also filed an attachment before judgment attaching \$15,000.00 which was due Schmidt by reason of a judgment in his favor entered by Judge Matthews on March 15, 1963, in the case of *Cunningham v. English, et al.*, being Civil Action No. 2361-57 (JA 38). The attachment was served on the Teamsters on March 22, 1963, and its answer was filed on April 3, 1963, in which it admitted that it had \$60,000.00 in its possession under the order of Judge Matthews on March 15, 1963.

The answer further contained a statement that it was withholding the sum of \$12,598.26 pursuant to an attachment in the case of *Smith v. Schmidt*, Civil Action No. 92-61. This action was commenced January 9, 1961, by one Smith who was represented by Spelman, and this sum was held by the Teamsters subject to a levy by the Internal Revenue Service dated November 18, 1962.

The action of Spelman and McCarthy, Civil Action No. 772-63, ended in a judgment in favor of *Spelman and McCarthy v. Schmidt* and which was reversed by this Court in No. 18617, with directions to enter judgment in favor of Schmidt, which was entered on November 23, 1966 (JA 20).

A motion for judgment was filed in the same cause, Civil Action No. 772-63, by *Schmidt v. Spelman and McCarthy*, for interest on the \$15,000.00 from March 22, 1963, until September 26, 1966, at the rate of 6% per annum, or \$3,150.00, and with costs of the appeal, growing out of the wrongful attachment made by Spelman and McCarthy (JA 21-22).

Opposition to the motion for judgment was filed on the basis that the attachment was in no legal sense wrongful and further that at the time of the attachment the Teamsters had been served with copies of the notice of levy by the Internal Revenue Service, and that Schmidt had sustained no damage or loss (JA 23-24).

The motion came on for hearing before Judge McGarraghy, the opposition of Spelman and McCarthy as set forth in their answer, the memo in support of their answer and the copies of the levies and three letters as exhibits 1 through 5 attached to the memorandum, and which are made a part of the record on this appeal (JA 25-30). The three letters, exhibits 3, 4 and 5, were written by Raymond W. Bergan, Esquire, attorney for the Teamsters.

The Court, on June 8, 1967, filed a memorandum stating that Schmidt failed to establish any damages because of the detention of his property since it appears that the United States tax lien was both prior in time and in right to the attachment before judgment (JA 31).

On June 22, 1967, an order was entered denying the motion in accordance with the memorandum opinion of June 8, 1967.

STATEMENT OF POINTS

1. The Court erred in refusing to hold factually and legally that the attachment of the funds of Schmidt was wrongful.
2. The Court erred in holding that Schmidt failed to establish any damages because the tax lien was both prior in time and in right to the attachment before judgment.
3. The Court erred in refusing to enter a judgment for interest for the period of time from the filing of the attachment on March 22, 1963, to September 26, 1966, when the final judgment in favor of Schmidt was entered.

SUMMARY OF ARGUMENT

1. The proceedings by motion for judgment in the same cause was proper. *Schmidt v. Smith*, 120 U.S. App. D.C. 74, 344 F.(2d) 168.
2. The failure of Spelman and McCarthy to sustain their allegations upon which the attachment was issued resulted in a wrongful suing out

of the attachment. *Davis v. Peerless Insurance Company*, 103 U.S. App. D.C. 125, 255 F.(2d) 534.

3. The finding of the trial judge that the levy of the Internal Revenue was prior in time and in right to the attachment before judgment is not in any way supported by the record. There was a levy on November 18, 1962, which had been answered and the \$15,000.00 attached by Spelman and McCarthy was not due or owing to Schmidt by the Teamsters until March 15, 1963.

ARGUMENT

I

The Attachment Before Judgment Was Wrongful

The attachment bond filed pursuant to D.C. Code § 16, 301-1961, is by Statute "conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment." As of December 23, 1963, this now appears as 16 D.C. Code 501(e).

This section of the Code was fully discussed in the case of *Schmidt v. Smith*, 120 U.S. App. D.C. 74, 344 F.(2d) 168.

What may be considered a wrongful attachment was clearly set out in the case of *Davis v. Peerless Insurance Company*, 103 U.S. App. D.C. 125, 255 F.(2d) 534, in which this Court made the following statement at page 128:

"That Stein's failure of success resulted in a 'wrongful suing out of the attachment,' as the term is used in our Code is not to be doubted. This result is not only recognized in practice over the years in the District of Columbia, but Stein's case was fully tried on the merits with judgment adverse to the claims of the plaintiff-in-attachment."

It is true Spelman and McCarthy obtained judgment in the trial Court which was reversed on appeal in this Court No. 18617, with the notation as it appears on page 15 of the slip opinion as follows:

"Since we are satisfied that the District Judge in the instant case had misapprehended the purport of our decision in Milone v. English, we are bound to reverse and to direct that judgment be entered for the appellants. It is so ordered."

It is the final judgment that is to be considered in determining whether or not there was a wrongful suing out of the attachment.

II

**Schmidt's Money Was Not Withheld Under
Any Federal Levy**

The attachment was issued on March 22, 1963, and the answer of the garnishee was filed on April 3, 1963 (JA 12). In substance, the garnishee stated that it had in its possession \$60,000.00 due Schmidt under the order of Judge Matthews of March 15, 1963. The answer of the garnishee further stated that it was withholding the sum of \$12,598.26 pursuant to an attachment previously issued in the case of *Smith v. Schmidt*, Civil Action No. 92-61. In that case Spelman was the attorney for Smith.

The record herein discloses the full answer of the garnishee in Civil Action No. 92-61 (JA 37), and its answer in Civil Action No. 772-63 (JA 12).

The levy of November 8, 1962, was referred to by Spelman and McCarthy in their memorandum which was made an exhibit to the memorandum filed in the trial Court and also to the levy of October 18, 1964, but the two copies, exhibits 1 and 2 to the memorandum, were copies of the levy of October 18, 1964, and the levy of November 8, 1962, which contains the same terms was not filed. There was

also appended to the memorandum exhibits 3, 4 and 5 which included the letter of Raymond W. Bergan, Esquire, dated March 26, 1964, wherein he referred to the levy of November 8, 1962.

In Bergan's letter to the District Director of Internal Revenue under date of March 26, 1964, which was exhibit No. 5 to the memorandum, and which appears in JA 29, in which he referred to Civil Action No. 92-61, and that covered the attachment and levy in that case, he stated that Schmidt had won that case and the \$12,598.26 was then free of any Court attachment.

Mr. Bergan goes on further in that letter and says that the International was also holding \$15,000.00 pursuant to an attachment issued before judgment in the case of *McCarthy and Spelman v. Schmidt*, Civil Action No. 772-63, and that Spelman and McCarthy now had a judgment against Schmidt and asking their advice concerning the disposition of the \$15,000.00.

This request was answered by the attachment levy under date of October 22, 1964.

The levy by the Internal Revenue Service in each case was similar and was in accordance with the requirements of Section 6331 and 6332 of Title 26 of the Revenue Code.

The levy referred to Section 6332(a) as follows:

"Surrender of Property Subject to Levy.

"(a) Requirement. — Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

Section 6331 (c) contains the following:

"Successive seizures. — Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid."

On November 8, 1962, the record clearly indicates that when that levy was made the Internal Revenue had \$12,598.26 which was being held by reason of the attachment before judgment issued January 9, 1961, in Civil Action 92-61, and the answer to the levy was also filed. The answer to that levy was final. It was not a continuing levy nor did the Internal Revenue Service so consider it for it issued another levy on October 22, 1964, which was its answer to the letter of counsel for the International.

Had the attachment not been issued on March 22, 1963, the entire \$60,000.00 would have been forwarded to Schmidt by the International in accordance with the judgment of Judge Matthews. As it was the attachment held up \$15,000.00, not by reason of the levy but by reason of the attachment before judgment filed by Spelman and McCarthy. Had the attachment not been made the \$15,000.00 would have been available to Schmidt for his use and a charge of 6% on this money was the proper claim for damages for the wrongful attachment made by Spelman and McCarthy.

The trial Court must have put great faith in the views expressed by counsel for the International in the letter of December 11, 1964, to Godfrey P. Schmidt in which it was stated in the last sentence of that letter, which was exhibit No. 3 (JA 27) to the memorandum filed by Spelman and McCarthy, as follows:

"Notwithstanding that the attachment before judgment in that case has now been reduced to judgment by an order dated March 13, 1964, I feel satisfied that the Internal Revenue lien was both prior in time and in right."

The Court failed to read that part of the levy which appears on exhibit No. 1 (JA 25) which was contained in the levy of November 8, 1962, which is as follows:

"Demand is again made for the amount set forth in the notice of levy, \$18,072.55, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served."

This is in accordance with Section 6331(c) set forth above and indicates most clearly that a levy only covered that which was owed by the International to the actual date of service.

The history of the difficulties of Schmidt from the time the entire Teamsters' litigation was started in November of 1967 have been before this Court many times. When the litigation was about completed and Congress had passed the Landrum-Griffin Act which gave to the members of the Teamsters practically everything that they prayed for in that litigation, new counsel came in representing the parties and there was a motion made to remove Schmidt as an attorney in the cause and Judge Letts appointed him the attorney for the class. Schmidt filed his motion for a fee which was agreed to by counsel for the Teamsters and Spelman and McCarthy, who did not represent any of the parties, opposed in every way the approval of the agreement for the payment of the fee due Schmidt, and it was not until March 15, 1963, that Judge Matthews signed the order allowing the fee of \$60,000.00.

Before any payment could be made by the Teamsters Spelman and McCarthy attached the \$15,000.00 which the final judgment of this Court has stated that they were not entitled to and that judgment is final.

CONCLUSION

It is respectfully submitted that the action of Spelman and McCarthy, in ~~disburse~~ attachment the sum of \$15,000.00 before judgment, *Was, Wrong*
and that Schmidt is entitled to a judgment in the amount of \$3,150.00, being 6% interest on the \$15,000.00 from the date of the attachment on March 22, 1963, until the final judgment was entered in the United States District Court on September 26, 1966.

Respectfully submitted,

CORNELIUS H. DOHERTY

1010 Vermont Avenue, N.W.
Washington, D.C.

Attorney for Appellant

(i)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH S. McCARTHY
Washington Building
Washington, D.C.

and

SEYMOUR J. SPELMAN
1518 32nd Street, N.W.
Washington, D.C.

Plaintiffs,

v.

JOHN T. WILEY
4 North Eighth Street
St. Louis, Missouri

and

GODFREY P. SCHMIDT
60 East 42nd Street
New York 17, New York

Defendants.

Civil Action No. 772-63

[Filed, March 22, 1963]

COMPLAINT FOR COUNSEL FEES

1. Plaintiffs Joseph S. McCarthy and Seymour J. Spelman are attorneys licensed to practice in the District of Columbia. Defendant John T. Wiley is a resident of and an attorney licensed to practise in the State of Missouri. Defendant Godfrey P. Schmidt is a resident of and an attorney licensed to practise in the State of New York.

2. In September 1957, thirteen (13) rank and file members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the International), in behalf of

themselves and the membership of said International, instituted in the District Court for the District of Columbia a true class action under Rule 23, F.R. Civ. P. against the officers of the International alleging fraud, mismanagement and abuses of fiduciary duties. Said action is entitled Cunningham et al. v. English et al., Civil Action No. 2361-57. On January 30, 1958, the Court entered a Consent Decree disposing of the issues raised in the complaint by the establishment of a three-member Board of Monitors whose function was to recommend and assist in the establishment of certain internal reforms in the International looking toward a new election of officers expressive of the free choice of the membership.

3. From the outset of said action until approximately March 30, 1960, defendant Godfrey P. Schmidt represented twelve (12) of the said 13 rank and file plaintiffs. On about March 30, 1960, plaintiff Spelman and Robert Silagi, member of the bar of the State of New York, succeeded defendant Schmidt as counsel to Steve Milone et al. (a group of the original 12 rank and file plaintiffs) and have served in that capacity to the present time. On or about November 12, 1960, plaintiff McCarthy succeeded defendant Schmidt as counsel to Edward McFarland et al. (the remaining members of the said 12 of the original 13 rank and file plaintiffs in Cunningham et al. v. English et al.), and has served in that capacity until the present time.

4. In February 1960, 183 individuals known as Dorsey et al. and Bath et al. (officers and representatives of various local unions affiliated with the International) filed an application for leave to intervene on the plaintiffs' side in Cunningham et al. v. English et al. On June 16, 1960, their intervention was allowed for certain limited purposes, as described in Dorsey et al. v. Cunningham et al., 108 U.S. App. D.C. 359, 282 F.2d 842). Defendant John T. Wiley, among others, served as counsel to said intervenors from that date to the present time.

5. On February 1, 1961, (when Cunningham et al. v. English et al. was in the final stages of litigation), plaintiffs McCarthy and Spelman

and the said Robert Silagi, in behalf of Milone et al. and McFarland et al. and all members of the class represented by them in the litigation, filed a comprehensive motion asking the Court for a determination that all attorneys representing plaintiff groups (including intervenors) were entitled to be paid counsel fees out of International funds for services after the entry of the Consent Decree on the basis of what the Court found to be their respective contribution to the class (the membership) in the litigation. Said motion was served on all counsel, including defendants herein, who appeared and participated in the argument.

6. On March 20, 1961, following oral argument, the Court entered an order denying the said motion. In its oral opinion, the Court stated that it was not contemplated that there would be payment of fees to plaintiffs' counsel after the signing of the Consent Decree on January 31, 1958; that when the Board of Monitors was appointed, all need for legal representation of the class ended.

7. Thereafter, on April 7, 1961, Milone et al. and McFarland et al., by their counsel—plaintiffs McCarthy and Spelman and the said Robert Silagi—took an appeal from the denial of the said motion, serving notice of same on defendants Schmidt and Wiley. Said defendants did not join the appeal, nor did they note a separate appeal.

8. While said appeal was pending, defendant Schmidt (on August 12, 1961) and defendant Wiley (on September 6, 1961) respectively filed motions in the lower court asking for counsel fees to be assessed against International funds for services after the entry of the Consent Decree. The International filed opposition to both said motions on the ground, inter alia, that the lower Court's ruling on the motion of Milone et al. and McFarland et al. constituted the law of the case and barred all counsel for plaintiff groups (including intervenors) from any payment of counsel fees out of International funds. The International therefore refused to pay fees to defendants Schmidt and Wiley, and the said motions were held in abeyance pending the disposition of the appeal of Milone et al. and McFarland et al.

9. On July 19, 1962, the Court of Appeals reversed the ruling of the lower court, stating that the establishment of the Board of Monitors did not displace the need for legal representation of the class and that "It lies now within the sound discretion of the District Court . . . to require the International to pay reasonable counsel fees to appellants' counsel should the court find . . . that they have benefited the International" by reason of their representation. [306 F.2d 814]

10. On February 16, 1963, defendants Schmidt and Wiley brought on for hearing before Judge Matthews their aforesaid motions for counsel fees. It was disclosed to the Court that the International had now withdrawn its previous opposition to said motions and had agreed to pay defendant Schmidt the sum of \$60,000.00 and defendant Wiley the sum of \$52,500.00. Milone at al. and McFarland et al., in behalf of themselves and the class, opposed payment of said fees on the ground that defendants, having failed to join in the appeal from the Court's order denying counsel fees, were not entitled to the benefits of the reversal of that order.

11. On March 11, 1962, Judge Matthews filed a Memorandum rejecting the opposition of Milone et al. and McFarland et al. and approving the aforesaid agreed fees. On March 15 and March 18, 1963, respectively, orders were entered granting judgment to defendant Schmidt in the sum of \$60,000.00 and defendant Wiley in the amount of \$52,500.00.

12. Plaintiffs McCarthy and Spelman and the said Robert Silagi by establishing their claim to fees necessarily established the claims of defendants Schmidt and Wiley. But for their efforts in securing the reversal of the lower court's ruling, no counsel fees would have or could have been paid to attorneys representing plaintiff groups in Cunningham et al. v. English et al. for services after the entry of the Consent Decree. Plaintiffs McCarthy and Spelman and the said Robert Silagi spent in excess of 1,500 hours in securing said ruling. No contribution to that effort was made, either in money or services, by

JA 5

defendants Schmidt and Wiley. Under the doctrine of Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777; Doherty v. Bress, 104 U.S. App. D.C. 308, 262 F.2d 20, cert. denied 79 S.Ct. 649; Lafferty et al. v. Humphrey, 248 F.2d 82 (D.C. Cir.); and Wash. Gas Light Co. v. Baker, 195 F.2d 29 (D.C. Cir.), plaintiffs are therefore entitled to an award of reasonable counsel fees and litigation expenses to be paid out of the fees awarded to defendants Schmidt and Wiley.

Wherefore, plaintiffs pray for a judgment against defendant Godfrey P. Schmidt for reasonable counsel fees and litigation expenses in the amount of \$15,000, and a judgment against defendant John T. Wiley for reasonable counsel fees and litigation expenses in the amount of \$13,125; and that execution on these judgments be had.

/s/ Joseph S. McCarthy,

Plaintiff, pro se

/s/ Seymour J. Spelman,

Plaintiff, pro se

[Filed, March 22, 1963]

AFFIDAVIT FOR ATTACHMENT BEFORE JUDGMENT

DISTRICT OF COLUMBIA, ss:

JOSEPH S. McCARTHY and SEYMOUR J. SPELMAN, each being first duly sworn on oath, depose and say:

That they are the plaintiffs in the above-entitled case, and have personal knowledge of the facts hereinafter set forth;

That plaintiffs have a just right to recover in the cause of action above mentioned which is an action for counsel fees on a quantum meruit basis in the amount of \$15,000.00 against defendant Godfrey P. Schmidt, exclusive of all set-offs and just grounds of defense, and in the amount of \$13,125.00 against defendant John T. Wiley, exclusive of all set-offs and just grounds of defense.

JA 6

Plaintiffs further say that defendant John T. Wiley and defendant Godfrey P. Schmidt are not residents of the District of Columbia.

/s/ Joseph S. McCarthy

Plaintiff

/s/ Seymour J. Spelman

Plaintiff

Subscribed and sworn to before me this 22 day of March, 1963.

[SEAL]

/s/

Notary Public, D.C.

My commission expires:

In the United States District Court for the
District of Columbia

Joseph S. McCarthy and

Seymour J. Spelman

Plaintiffs,

vs.

John T. Wiley and

Godfrey P. Schmidt

Defendants.

772-83

Civil Action, No.

of plaintiff 56,250 =

3-22 63

Marian M. Jenkins

HE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the defendants' lands and
nements, property and credits which shall be found in this District, to the value of \$15,000.00

~~and interest of defendant Godfrey P. Schmidt, and \$13,125.00 of defendant~~

John T. Wiley

being the amount of the plaintiffs demand against the defendants, as shown by their affidavit, and
aimed in their complaint, and the further sum of \$100.00, for the costs and charges
which may accrue in the premises; and the same so attached, safely keep, subject to the orders of the
Court, unless the defendants or the person in whose possession the property is attached, deliver to you,
be filed herewith, his undertaking, with sufficient surety or sureties to abide by and perform the judg-
ment of the Court in relation to said property. And should you attach the defendant's property or
credits in the possession of any other person or persons than the defendants you shall notify such person
or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them
as well as on said defendants, to appear in said Court on or before the twentieth day, exclusive of Sun-
days and legal holidays, accruing after the service of said notice, to show cause, if any there be, why the
property or credits so attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the

22nd

day of March, A. D. 1963

HARRY M. HULL, Clerk.

(By) *Marian M. Jenkins*
Deputy Clerk.

JA 8

NOTICE

March

2

, 19 63

To Godfrey P. Schmidt and John T. Wiley, Defendants,

International Brotherhood of Teamsters, Garnishee

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendants, seized by virtue of of Teamsters, the foregoing Writ of Attachment in the hands of International Brotherhood, Garnishee (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

District of Columbia

U. S. Marshal.

Deputy U. S. Marshal

MARSHAL'S RETURN

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code.

, 19

Attached credits, property of the defendant, in the hands of _____
Garnishee, and served said garnishee and defendant with copies of this Writ, Interrogatories, and the Notices Prescribed by Sections 446 and 456 of the Code.

, 19

Defendant _____

U. S. Marshal.

BEST COPY

from the original

Interrogatories in Attachment Before Judgment

United States District Court for the District of Columbia

Joseph S. McCarthy and _____
Seymour J. Spelman, Plaintiffs,
vs.
John T. Wiley and _____
Godfrey P. Schmidt, Defendants.

CIVIL Action No. 172-
X-1944

NOTICE

To International Brotherhood of Teamsters....., Garnishee :

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Defendant J. J. Higgins
Joseph J. Higgins
Attala, Corinth, MS.
Pro Se

Y AVAILABLE

and bound volumes

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendants? If so, how, and in what amount?

ANSWER: Godfrey P. Schmidt:

John T. Wiley:

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendants in your possession or charge? If so, what?

ANSWER: Godfrey P. Schmidt:

John T. Wiley:

FILED

MAR 29 1963

HARRY M. HULL CLERK

Subscribed and sworn to before me this _____ day of
A. D. 19_____

JA 11

Interrogatories in Attachment Before Judgment

United States District Court for the District of Columbia

Joseph S. McCarthy and
Seymour J. Spelman, Plaintiffs,
vs.
John T. Wiley and
Godfrey P. Schmid, Defendants.

CIVIL Action No. _____
Exhibit No. _____

772-83

FILED

APR 3 1953

HARRY M. HULL, CLERK
To International Brotherhood of Teamsters, Garnishee :

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Pro Se

AVAILABLE

bound volume

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

ANSWER: Godfrey P. Schmidt: yes

John T. Wiley: yes

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant: in your possession or charge? If so, what?

ANSWER: Godfrey P. Schmidt: Pursuant to an order entered by Hon.

Burnita Shelton Matthews on March 15, 1963 the International Brotherhood of Teamsters is indebted to Mr. Schmidt in the amount of \$60,000. In addition thereto, the International Brotherhood of Teamsters is withholding \$12,598.26 pursuant to an attachment previously issued from this Court in Smith v. Schmidt, No. 92-61.

John T. Wiley: Pursuant to an order entered by Hon. Burnita Shelton Matthews on March 18, 1963 the International Brotherhood of Teamsters is indebted to Mr. Wiley in the amount of \$52,500.

Franklin He
Subscribed and sworn to before me this 7th day of April 1963
A.D. 1963

Ann L. Sprogue, Notary Public
District of Columbia
Residing at 25 Louisiana Ave., N. W.
Washington 1, D. C.
My Commission Expires June 30, 1965

Ann L. Sprogue

[Filed, May 14, 1963]

ANSWER OF GODFREY P. SCHMIDT

Comes now the defendant, Godfrey P. Schmidt, by and through his attorney, Cornelius H. Doherty, and for answer to the complaint filed herein avers as follows:

1. This defendant admits that he is a citizen and resident of the State of New York and that he is an attorney licensed to practice in the State of New York and in the District of Columbia.
2. This defendant admits the allegations of paragraphs 2 and 3 of the complaint.
3. This defendant admits the allegations of para No. 4.
4. This defendant admits that the plaintiffs and one Robert Silagi filed a motion covering counsel fees, but the defendant denies that the motion was on behalf of this defendant and denies that he appeared and participated in the argument of the motion but merely for his protection in the matter of the order which was submitted to the Court.
5. This defendant denies the allegations of paragraph 6 insofar as the statement allegedly made by the Court refers to this defendant.
6. This defendant admits the allegations contained in paragraph 7 of the complaint, with the exception that he has no memory of receiving a copy of the notice of appeal and did not join in the appeal, nor did he note a separate appeal for the reason that he was not a party to the motion from which the appeal was noted.
7. This defendant, in answer to paragraph 8, avers that he had numerous discussions with counsel for the International relative to compensation due him for his professional services prior to the filing of the motion by plaintiffs, and does admit that while plaintiffs' appeal was pending he filed a motion covering fees due him by virtue of the terms of the consent decree and that this motion was held in abeyance pending the disposition of the appeal filed by plaintiffs.

8. This defendant, for answer to paragraph 9, refers to the full opinion of the United States Court of Appeals for the District of Columbia Circuit.

9. This defendant admits the allegation of paragraph 10 that his motion for counsel fees came on for hearing before Judge Matthews on February 16, 1963, upon the consent agreement between this defendant and counsel for the International that the International would pay to this defendant the sum of Sixty Thousand (\$60,000.00) Dollars. This defendant admits that the plaintiffs herein did everything they possibly could to oppose the payment of this fee to this defendant.

10. This defendant admits that on March 11, 1963, Judge Matthews rejected the opposition filed by the plaintiffs and approved the consent fee to this defendant, and on March 15, 1963, an order was entered granting the sum of Sixty Thousand (\$60,000.00) Dollars to this defendant.

11. This defendant, in answer to the allegations of paragraph 12 of the complaint, denies that the plaintiffs and the said Robert Silagi established any claim on behalf of this defendant and avers that if plaintiffs had not filed their motion the defendant would have had a consent decree for the fees due him long prior to March 15, 1963. This defendant further denies that the action of the plaintiffs in the filing of their motion or of the appeal taken by them contributed in any way in assisting this defendant to obtain payment for his services, which was in accord with paragraph 14 of the original consent decree.

12. This defendant says that if the plaintiffs are entitled to any fee or fees for their services in the filing of the motion and the appeal, and any other services rendered, including litigation expenses, they must look to the parties against which their original motion was filed and from which they took an appeal.

JA 15

The premises considered, this defendant denies that the plaintiffs are entitled to a judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, or in any sum, and that their complaint should be dismissed with costs.

/s/ Cornelius H. Doherty
1010 Vermont Avenue, N.W.
Washington, D.C.
Attorney for Godfrey P. Schmidt

[Certificate of Service, May 14, 1963]

JA 16

[Filed March 13, 1964]

ORDER

Upon consideration of the "MOTION OF DEFENDANT WILEY TO RESETTLE LIABILITY" filed on March 6, 1964, and counsel for all parties having agreed to oral argument on said motion on March 9, 1964, and the Court having heard argument in support of the motion from counsel for defendant John T. Wiley, and counsel for defendant Godfrey P. Schmidt having adopted the motion and the contentions advanced in support thereof by counsel for defendant John T. Wiley, and counsel for plaintiffs having been heard in opposition to the motion, and the Court having considered the memorandum in support of the motion filed by counsel for defendant John T. Wiley on March 6, 1964, it is by the Court this 13th day of March, 1964:

ORDERED, that the "MOTION OF DEFENDANT WILEY TO RESETTLE LIABILITY" be, and it hereby is, DENIED.

/s/ Joseph C. McGarraghy
Judge

No objection as to form:

Attorney for Defendant John T. Wiley

Attorney for Defendant Godfrey P. Schmidt

JA 17

[Filed March 13, 1964]

JUDGMENT

This cause having come on to be heard on the issue of the quantum of the judgment to be entered, the issue of liability of the defendants to the plaintiffs having been determined in favor of the plaintiffs by the Court's order of November 13, 1963, and redetermined in their favor on March 9, 1964, and evidence having been adduced by the parties on January 7, 8, and 27, 1964, and the Court having considered proposed findings of fact and conclusions of law submitted by the parties and having heard oral argument on March 9, 1964, and the Court having made its findings of fact and conclusions of law on March 13, 1964, it is by the Court this 13th day of March, 1964.

ADJUDGED, ORDERED AND DECREED that the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, jointly and severally have judgment against the defendant, John T. Wiley, in the amount of \$13,125.00, with costs and interest thereon from this date; and it is further

ADJUDGED, ORDERED AND DECREED that credits of John T. Wiley in the possession of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, garnishee, held pursuant to the attachment before judgment filed in this action by plaintiffs against said garnishee be, and the same hereby are, condemned to the extent of \$13,125.00; and said garnishee is directed to disburse said amount in a draft payable jointly to Joseph S. McCarthy and Seymour J. Spelman.

/s/ Joseph McGarraghy

Judge

No objection as to form:

Attorney for Defendant John T. Wiley

JA 18

[Filed, March 13, 1964]

JUDGMENT

This cause having come on to be heard on the issue of the quantum of the judgment to be entered, the issue of liability of the defendants to the plaintiffs having been determined in favor of the plaintiffs by the Court's order of November 13, 1963, and evidence having been adduced by the parties on January 7, 8, and 27, 1964, and the Court having considered proposed findings of fact and conclusions of law submitted by the parties and having heard oral argument on March 9, 1964, and the Court having made its findings of fact and conclusions of law on March 13, 1964, it is by the Court this 13th day of March, 1964,

ADJUDGED, ORDERED AND DECREED that the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, jointly and severally have judgment against the defendant, Godfrey P. Schmidt, in the amount of \$15,000, with costs and interest thereon from this date; and it is further

ADJUDGED, ORDERED AND DECREED that credits of Godfrey P. Schmidt in the possession of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, garnishee, held pursuant to the attachment before judgment filed in this action by plaintiffs against said garnishee be, and the same hereby are, condemned to the extent of \$15,000.00; and said garnishee is directed to disburse said amount in a draft made payable jointly to Joseph S. McCarthy and Seymour J. Spelman.

/s/ Joseph McGarraghy
Judge

No objection as to form:

Attorney for Defendant Godfrey P. Schmidt

JA 19

[Filed Oct. 3, 1966]

**UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit**

No. 18,617 September Term, 1965

Godfrey P. Schmidt, Appellant,

v. Civil 772-63

**Joseph S. McCarthy and
Seymour J. Spelman, Appellees.**

No. 18,626

John T. Wiley, Appellant

Civil 772-63

Joseph S. McCarthy and
Seymour J. Spelman, Appellees.

Appeals from the United States District Court for the District of Columbia.

Before: Washington, Senior Circuit Judge*, and Danaher and Burger, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are reversed, and these cases are remanded to the District Court with the direction that judgment be entered for the appellants.

JA 20

It is further ORDERED by the court that appellants herein recover from appellees their taxable costs on these appeals, and have execution therefor.

Per Circuit Judge Danaher

Dated: July 21, 1966.

*Washington, Senior Circuit Judge, did not participate in this decision.

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

**JOSEPH S. McCARTHY
SEYMOUR J' SPELMAN**

Plaintiffs

vs.

Civil Action No. 772-63

GODFREY P. SCHMIDT, et al.,

Defendants

JUDGMENT ON MANDATE

This cause came on to be heard upon the mandate of the United States Court of Appeals for the District of Columbia Circuit entered herein on the 3rd day of October, 1966, reversing the judgment entered herein in favor of the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, against the defendant, Godfrey P. Schmidt, with directions to enter judgment in favor of the defendant, Godfrey P. Schmidt, it is, by the Court, this 23rd day of November, 1966.

JA 21

ORDERED that the judgment herein in favor of the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, against the defendant, Godfrey P. Schmidt, be, and the same hereby is, set aside and judgment is entered herein in favor of the defendant, Godfrey P. Schmidt, with costs.

Judge

(Certificate of Service, Nov. 21, 1966)

**MOTION FOR JUDGMENT AGAINST PLAINTIFFS AND
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND**

Comes now the defendant, Godfrey P. Schmidt, by and through his attorney, Cornelius H. Doberty, and moves the Court to enter judgment against Joseph S. McCarthy and Seymour J. Spelman, and Fidelity and Deposit Company of Maryland, for costs and damages sustained by reason of the wrongful suing out of an attachment before judgment, and in support of said motion submits the following:

1. On March 22, 1963, the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, filed an attachment before judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars attaching monies due the defendant, Godfrey P. Schmidt, in the hands of the International Brotherhood of Teamsters and filed a bond in accordance with Title 16, Section 301 of the 1961 District of Columbia Code with Fidelity and Deposit Company of Maryland as surety.
2. The garnishee, International Brotherhood of Teamsters filed its answer admitting the attachment of the sum of Fifteen Thousand

(\$15,000.00) Dollars and that it was holding the funds of the defendant, Godfrey P. Schmidt, in that sum subject to the further order of the Court, which said monies have been held by the garnishee, International Brotherhood of Teamsters from March 22, 1963, to September 26, 1966, and this defendant claims interest thereon from March 22, 1963, to September 26, 1966, at the rate of 6% per annum, or Thirty-One Hundred Fifty (\$3150.00) Dollars.

3. By reason of his financial condition, the defendant was unable to obtain a release of the amount of the funds held subject to the attachment, and thereafter a lien was placed thereon by the Internal Revenue Service which is still in force and effect.

4. In addition to the foregoing interest due this defendant, it was necessary that he expend costs in the sum of Four Hundred Seventy-Four Dollars and Sixty Cents (\$474.60), making a total of Thirty-Six Hundred Twenty-Four Dollars and Sixty Cents (\$3624.60).

5. A final judgment was entered in favor of this defendant on the 26th day of September, 1966, which said judgment is now final.

WHEREFORE, the defendant, Godfrey P. Schmidt, demands judgment against the plaintiffs, Joseph S. McCarthy and Seymour J. Spelman, and their surety, Fidelity and Deposit Company of Maryland, a Corporation, for the damages sustained by the unlawful attachment in the sum of Thirty-Six Hundred Twenty-Four Dollars and Sixty Cents (\$3624.60), with interest thereon from September 26, 1966.

Cornelius H. Doherty
Attorney for Godfrey P. Schmidt

[Certificate of Service, April 3, 1967]

OPPOSITION TO MOTION FOR JUDGMENT

Now come the plaintiffs, Joseph S. McCarthy, Seymour J. Spelman and the Fidelity and Deposit Company of Maryland, and oppose the entry of judgment against them as prayed for by the defendant herein upon the following grounds:

1. It is abundantly clear that the attachment before judgment levied herein under date of March 22, 1963, against the defendant, Godfrey P. Schmidt, was in all respects proper under the District of Columbia Code. Further, the attachment was in no legal sense "wrongful" and the mere fact that the Court of Appeals reversed the judgment entered in the trial court in favor of the plaintiffs McCarthy and Schmidt is not decisive on that question.
2. Further, that at the time the attachment before judgment upon which the defendant now claims damages and interest against the plaintiffs McCarthy and Spelman was filed, the stakeholder herein, the International Brotherhood of Teamsters, had been served with copies of Notices of Levy against the defendant Schmidt by the Internal Revenue Service which Notices became prior in right to the inchoate attachment of the individual plaintiffs herein. Accordingly, since the International Brotherhood of Teamsters as stakeholder could not and did not in view of the Internal Revenue Service liens, disburse the funds subject to the attachment, the defendant Schmidt has sustained no damage or loss.
3. By letter dated April 10, 1967, a check in the amount of \$497.20 was tendered to counsel for defendant Schmidt, representing the assessable costs in this action at the District Court level as well as costs on the mandate from the U.S. Court of Appeals which sum represented the entire liability of the plaintiffs to the defendant Schmidt. That tender was rejected by Schmidt.

JA 24

For the foregoing reasons, the plaintiffs McCarthy and Spelman and the Fidelity and Deposit Company of Maryland ask that the relief sought herein be denied.

Respectfully submitted,

JOSEPH S. McCARTHY, Esq.

SEYMOUR J. SPELMAN, Esq.

[Certificate of Service, April 21, 1967]

EXHIBIT #1
U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICEForm 363-C
MAY, 1954.

FINAL DEMAND

DISTRICT

25th District

DATE

10-12-63

TO: International Teamster Union Headquarters
Washington, D.C.

On July 21, 1962, there was served upon you a levy, by leaving with James J. McGuire, Comptroller at above address a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Godfrey P. Sutton II & Sons Inc. of 9 Bayview Road New Rochelle, who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of \$ 23,072.55. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Deemed.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, \$ 23,072.55, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE (By Signature)

TITLE

REVENUE DIRECTOR

CHARLES L. GILL

CERTIFICATE OF SERVICE

I hereby certify that the Final Demand was served by handing a copy thereof to:

NAME

J. T. Bullock, Jr.

TITLE

CLERK.

PLACE

25th District

DATE

10/12/63

TIME

11:00 AM

REVENUE OFFICE SIGNATURE

J. T. Bullock, Jr.

DATE

10/12/63

FORM 363-C (REV. 7-59)

* GPO: 1959 O-5160

BEST COPY AVAILABLE

from the original bound volume

EXHIBIT #2

C. A. 772-63

Form 668-C
(REV. JULY 1955)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

FINAL DEMAND

DISTRICT

DATE

20-12-61

TO: International Brotherhood of Teamsters
Office of John F. English, Gen. Soc., Treas.
25 Louisiana Ave., N.W. Washington, D.C.

ATT: William T. Mullinholz, Comptroller

On November 8, 1962, there was served upon you a levy, by leaving with W.T. Mullinholz, Comptroller at above address a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Godfrey P. & (CLARENCE) Schmidt of 60 East 42nd Street & 1009 Park Ave New York City, who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of \$ 61,965.00. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, \$ 61,965.00, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE

BY (Signature)

TITLE

Chester L. French

Revenue Officer

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

NAME

W.T. Mullinholz

TITLE

Comptroller

PLACE

25 - 42nd Street

DATE

10-12-61

TIME

16:00 hrs

REVENUE OFFICER (Signature)

W.T. Mullinholz

DATE

10-12-61

FORM 668-C (REV. 7-59)

GPO: 1958 O-816448

BEST COPY AVAILABLE
from the original bound volume

JA 27

C.A. 772-63

EXHIBIT No. 3

December 11, 1964

Godfrey P. Schmidt, Esq.
60 East 42nd Street
New York 17, New York

Dear Godfrey:

The International Union is today transmitting to the Internal Revenue Service in New York checks totaling \$27,598.26. This represents the sum total of funds held at the International Union for your account and is being transmitted to the Service pursuant to notices of levy and final demands served upon the International in amounts well in excess of the amount being forwarded.

Of the money being transmitted to the Service, \$12,598.16 represents an amount withheld pursuant to an attachment before judgment in the case of *Schmidt v. Schmidt*, Civil Action No. 92-61 in the United States District Court for the District of Columbia. Since you were successful in that case, that money must necessarily revert to the Internal Revenue Service.

The remaining amount represents funds retained pursuant to an attachment before judgment in the case of *McCarthy and Spelman v. Wiley and Schmidt*, Civil Action No. 77-63 in the United States District Court for the District of Columbia. Notwithstanding that the attachment before judgment in that case has now been reduced to judgment by an order dated March 13, 1964. I feel satisfied that the Internal Revenue lien was both prior in time and in right. We are therefore disbursing proceeds of both checks.

By copy of this letter I am advising the parties to both cases of the action being taken.

Very truly yours,

RWB:sh

cc: Eugene F. Mullin, Jr. Esq.

Mozart G. Ratner, Esq.

Seymour J. Spelman, Esq.

Cornelius H. Doherty, Jr., Esq.

/s/ Raymond W. Bergan

JA 28

C.A. 772-63

EXHIBIT No. 4

February 15, 1965

Eugene F. Mullin, Jr., Esq.
Mullin and Connor
515 Southern Building
Washington 5, D.C.

Re: McCarthy and Spelman
v. Wiley and Schmidt

Dear Frank:

This is in reply to your letter of January 21st in which you question the right of the International Union to have disbursed to the Internal Revenue Service monies held for the credit of Godfrey Schmidt. Without entering into any lengthy disquisition, I can only advise that in the view of counsel representing the International, the demands by the Internal Revenue Service were both prior in time and prior in right to those made by your clients, and accordingly, the International was advised to make payment to the Internal Revenue Service. There is involved here no question of unwillingness or refusal to adhere to a court's judgment, but rather the inability to do so by virtue of a supervening event.

Very truly yours,

Raymond W. Bergan

RBW:sh

cc: Joseph S. McCarthy, Esq. Cornelius H. Doherty, Esq.
Seymour J. Spelman, Esq. Mr. William T. Mullenholz
Godfrey P. Schmidt, Esq.

JA 29

C.A. 772-63

EXHIBIT No. 5

March 26, 1964

District Director of
Internal Revenue
120 Church Street
New York, New York 10007

Re: Godfrey P. and Grace H. Schmidt

Dear Sir:

This office is general counsel for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. During the year 1961 there was served on the International Union a Notice of Levy against the above-referenced individuals and four Notices of Tax Liens totaling at that time \$61.965. At the time one of the liens was served, the International Union was withholding \$12,598.26 due to Godfrey Schmidt. It was withheld pursuant to an attachment served on January 10, 1961 on behalf of Lawrence T. Smith, plaintiff in the case of *Smith v. Schmidt*, Civil Action No. 92-61 in the United States District Court for the District of Columbia. The attachment was issued before judgment in accordance with D.C. Code, §§ 16-301 - 16-305. Mr. Schmidt has now won that case and the \$12,598.26 is free of any court attachment.

The International Union is also holding \$15,000 pursuant to an attachment issued before judgment in the case of *McCarthy and Spelman v. Wiley and Schmidt*, Civil Action No. 77-63 in the United States District Court for the District of Columbia. That attachment was issued on March 22, 1963 at a time when that amount of money was owing from the Union to Mr. Schmidt. A judgment in that case has now been entered in favor of Messrs. McCarthy and Spelman against Mr. Schmidt and an order entered by the United States District Court for the District of Columbia condemning the

JA 30

\$15,000 held by attachment and directing the International Union to disburse such funds to Messrs. McCarthy and Spelman.

As counsel for the International Union, I should like to be advised as to the present status of the attachments against Mr. Schmidt. Quite clearly, if any federal tax liens remain outstanding against him, the \$12,598.26 which is now being held at the International Union is available for immediate disbursement to the Internal Revenue Service. It is also my understanding that a federal tax lien has priority over an attachment before judgment and that, consequently, the \$15,000 would now be payable to the Internal Revenue Service. Since the International Union is in the position of a stake-holder, I should like to be advised what position the service takes with respect to the two items mentioned in this letter. Specifically with respect to the \$15,000 item, I should like to be advised whether the Service intends to take any action by way of notifying the court in the District of Columbia of the existence of its tax liens or whether you intend to make a demand upon the International Union for disbursement of the money there involved.

I would appreciate a reply at your early convenience.

Very truly yours.

Raymond W. Bergan

CC: Mr. John F. English
General Secretary-Treasurer, I.B.T.
Seymour J. Spelman, Esq.
Counsel for Lawrence T. Smith
Eugene F. Mullin, Jr., Esq.
Counsel for McCarthy and Spelman
Cornelius H. Doherty, Esq.
Counsel for Godfrey P. Schmidt
Godfrey P. Schmidt, Esq.

JA 31

MEMORANDUM

The Court is of the opinion that the defendant has failed to establish that the suing out of the writ of attachment was wrongful within the provisions of Title 16, Section 501(e) of the District of Columbia Code.

Also, the defendant has failed to establish any damages sustained by him because of the detention of his property, since it appears in this proceeding that U. S. tax liens filed with the International Brotherhood of Teamsters were both prior in time and in right to the attachment before judgment herein and, therefore, defendant's funds were not detained and the defendant did not sustain any loss because of the detention of his property by the plaintiffs.

Accordingly, the defendant's motion for judgment for damages will be denied.

Joseph C. McGarraghy

Judge

June 8, 1967

ORDER

Upon consideration of a Motion for Judgment, filed on behalf of the defendant Godfrey P. Schmidt, and upon consideration of the Points and Authorities in support thereof and those in opposition thereto, and after having had the benefit of oral argument by counsel, it is this 12 day of June, 1967.

ORDERED, that the Motion be and the same is hereby denied, in accordance with a Memorandum Opinion filed June 8, 1967 in the cause.

J U D G E

[Certificate of Service, June 13, 1967]

RELEVANT DOCKET ENTRIES

1963

Mar. 22 Complaint and summons
Mar. 22 Affidavit of Plffs in support of Attachment before Judgment.
Mar. 22 Bond in attachment before Judgment in sum of \$56,250.00
Mar. 22 Attachment, writs and interrogatories; Deposit by J. McCarthy.
Apr. 3 Answer of International Brotherhood of Teamsters, garnishee, to interrogatories
Apr. 17 Appearance of Mozart G. Ratner, atty for deft #1.
Apr. 17 Motion of deft #1 to extent time to answer to June 17, 1963
Apr. 26 Appearance of Cornelius H. Doherty for deft #2.
May 13 Order extending time for deft Wiley to plead to complaint to 6/17/63
May 14 Answer of deft #2 to complaint; appearance of Cornelius Doherty.
Jun 13 Motion of deft #2 for summary judgment; statement, memorandum in support
Jun 17 Motion of deft #1 for extension of time to answer complaint
Jun 28 Stipulation extending time for filing objections to motion of deft #2 for summary judgment.
Jul 17 Motion of deft #1 to dismiss for award of damages, atty fees and other relief
Jul 18 Opposition of pltf to motion of deft #2 for summary judgment
Sep. 19 Stipulation extending time for pltf to file opposition to motion of deft #1 to dismiss
Oct. 16 Appearance of Eugene F. Mullin, Jr., J. Parker Connor and S. White Rhyne as attys for pltfs.
Oct. 16 Stipulation extending time for pltf to answer motion to dismiss to and including 10/28/63
Oct. 21 Notice of hearing
Oct. 28 Motion of pltfs for summary judgment; P&A; statement; affidavit; opposition to motion for summary judgment;
Nov. 4 Memorandum of deft in reply to pltfs opposition to motion to dismiss and in reply to P&A in support of pltfs motion for summary judgment; appendix A&B; affidavit; statement
Nov. 5 Opposition of deft #2 to motion for summary judgment
Nov. 6 Supplemental certificate of service of memorandum of John T. Wiley

Nov. 13 Order denying deft Schmidt's motion for summary judgment in all respects; denying deft Wiley's motion to dismiss complaint and for award of damages, atty's fees and other relief in all respects; granting pltfs' motion for summary judgment on the issue of liability directing that issue of damages be set down for hearing as soon as practicable and that attachment entered in action shall remain in effect pending order of court. McGarraghy, J.

Nov. 20 Official transcript of testimony 11/6/63

1964

Jan 7, 8, 27 - Hearing on issue of damages, McGarraghy, J.

Mar. 6 Motion of deft to resettle liability; P&A

Mar. 9 Hearing on issue of damages resumed; finding for pltf. (judgment to be presented.) McGarraghy, J.

Mar. 13 Order denying the motion of deft Wiley to resettle liability. McGarraghy, J.

Mar. 13 Findings of fact and conclusions of law. McGarraghy, J.

Mar. 13 Judgment for the pltfs against the deft John T. Wiley in the amount of \$13,125.00 with costs and interest thereon from this date; and condemning the credits of John T. Wiley in the possession of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, garnishee, in the amount of \$13,125.00; and directing said garnishee to disburse said amount payable jointly to the pltfs. McGarraghy, J.

Mar 13 Judgment for the pltfs against the deft Godfrey P. Schmidt in the amount of \$15,000.00 with costs and interest thereon from this date; and condemning the credits of Godfrey P. Schmidt in the possession of International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, garnishee, in the amount of \$15,000.00; and directing said garnishee to disburse said amount payable jointly to the pltfs. McGarraghy, J.

Apr. 8 Notice of appeal by defendant #2 from order 3-13-64

Apr. 8 Cost bond on appeal by defendant #2 in sum \$250.00

Apr. 9 Notice of appeal by defendant #1 from judgment of Mar. 13, 1964

**In the United States District Court for the
District of Columbia**

LAWRENCE T. SMITH

Plaintiff ,

vs.

GODFREY P. SCHMIDT

Defendant .

92-61

Civil Action, No. 92-61 for \$25,196.5
Undertaking 1/2 of 1% for 1/2 of 1%
Approved by Clerk 1-9-61
HARRY M. HULL, Clerk

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the defendant lands and tenements, property and credits which shall be found in this District, to the value of \$ 12,598.26 with interest at 6% per annum from June 30, 1959.

being the amount of the plaintiff's demand against the defendant, as shown by his affidavit, and claimed in his complaint, and the further sum of \$_____, for the costs and charges which may accrue in the premises; and the same so attached, safely keep, subject to the orders of the Court, unless the defendant or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety or sureties to abide by and perform the judgment of the Court in relation to said property. And should you attach the defendant's property or credits in the possession of any other person or persons than the defendant you shall notify such person or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them as well as on said defendant, to appear in said Court on or before the twentieth day, exclusive of Sundays and legal holidays, accruing after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the 9th
day of January, A. D. 1961

HARRY M. HULL, Clerk.

(By) Maurice M. Jenkins
Deputy Clerk.

BEST COP

from the origi

NOTICE

January 9, 19 61To Godfrey P. Schmidt, Defendant,International Brotherhood of Teamsters, Garnishee.

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of

Teamsters

the foregoing Writ of Attachment in the hands of International Brotherhood of /, Garnishee (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.U. S. Marshal

MARSHAL'S RETURN

Jessette Anderson

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code.

, 19 —Attached credits, property of the defendant, in the hands of _____
Garnishee, and served said garnishee and defendant with copies of this Writ, Interrogatories, and
the Notices Prescribed by Sections 446 and 456 of the Code., 19 —

Defendant _____

U. S. Marshal

Interrogatories in Attachment . . . fore Judgment

United States District Court for the District of Columbia

LAWRENCE T. GARTH		92-61	
		Plaintiff	Civil No. 92-61 Court No.
		vs.	
GORDON P. SCHROEDER		Defendant	

JA 36

F I L E D

JAN 17 1961

N O T I C E

To International Brotherhood of Teamsters,
14th & Garfield Street

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Serg. George J. P. Curran
Attorneys for Plaintiff

BEST COPIES
from the original

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

ANSWER: Cunningham, et al. v. John F. English, et al., Civil Action No. 2361-57, The Honorable F. Dickinson Letts reinstated an award first made on July 16, 1958 and later vacated by the Court of Appeals on June 12, 1959 in International Brotherhood of Teamster 2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER:

No. cont'd. -- v. Dodd, et al., No. 14, 733; later reinstated on December 9, 1959 and subsequently reversed by the Court of Appeal on June 13, 1960 in International Brotherhood of Teamsters, et al. v. Godfrey P. Schmidt, et al., 282 F. 2d 837) of \$105,000.00 to Godfrey P. Schmidt and an equal amount jointly to two others. By agreement of all parties concerned, the amount due and owing has been reduced to \$95,000.00 to Mr. Schmidt and a like amount jointly to the others and the time of payment has been deferred.

JA 37

No. 2: Other than as set forth above, we neither had at the time of service nor do we now have any other property in our possession belonging to or credited to the defendant.

John J. English
General Secretary-Treasurer

Subscribed and sworn to before me this 17th day of January

A. D. 1961.

Ann L. Specchio, Notary Public
District of Columbia
Residing at 25 Loughran Ave. N. W.
Washington 1, D. C.
My Commission
20, 1965

JA 38

[Filed Mar. 15, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN CUNNINGHAM, ET AL..

Plaintiffs,

vs.

JOHN F. ENGLISH, ET AL.,

Defendants.

Civil Action
No. 2361-57

ORDER

This matter having come on for hearing on the application of Mr. Godfrey P. Schmidt for approval of counsel fees, and this Court having heard the statement of the defendants and the argument of counsel, and having considered the briefs and other submissions by the parties hereto and being fully advised, it is by the Court, this 15th day of March, 1963

ORDERED, that a fee award in the amount of \$60,000 to Godfrey P. Schmidt is approved and the defendants are hereby directed to make payment to Mr. Schmidt in that amount.

/s/ Burnita Shelton Matthews
Judge

JA 39

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH S. McCARTHY
SEYMOUR J. SPELMAN
Plaintiffs.

vs.

GODFREY P. SCHMIDT, et al.,
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

Defendants

Civil Action
No. 772-63

NOTICE OF APPEAL

Notice is hereby given this 29th day of June, 1967,
that Godfrey P. Schmidt hereby appeals to the United States Court
of Appeals for the District of Columbia from the judgment of the
Court entered on the 22nd day of June, 1967, in favor of the
plaintiffs, Joseph S. McCarthy and Seymour J. Spelman denying
the motion of Godfrey P. Schmidt for judgment.

Cornelius H. Doherty
Attorney for Godfrey P. Schmidt

Copies to be sent to:

Joseph S. McCarthy, Esquire
1701 K Street, N. W.
Washington, D. C.

Seymour J. Spelman, Esquire
1925 N. Lynn Street
Arlington, Virginia, 22209

160
B
BRIEF FOR APPELLEES

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,177

GODFREY P. SCHMIDT, *Appellant*,

v.

JOSEPH S. McCARTHY, SEYMOUR J. SPELLMAN

and

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Appellees*.

Appeal From the United States District Court for the
District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED NOV 6 1967 SEYMOUR J. SPELLMAN
JOSEPH S. McCARTHY

Appellees, Pro Se

Nathan J. Paulson and as Counsel for Fidelity and
Deposit Company of Maryland

CLERK

October 30, 1967

Printed by BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees, the questions are:

1. Was the trial court correct in holding that appellant had failed to show that there was a "wrongful swing out of the attachment" within the meaning of Title 16-501, District of Columbia Code?
2. Was the trial court correct in holding that appellant had failed to show that he had sustained any damages under appellees' attachment since his property was detained, not by appellees' attachment, but by Internal Revenue Service levies which were prior in time and in right?

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II. Even Assuming the Attachment Was Wrongful, Appellant Is Not Entitled to Damages	9

CITATIONS

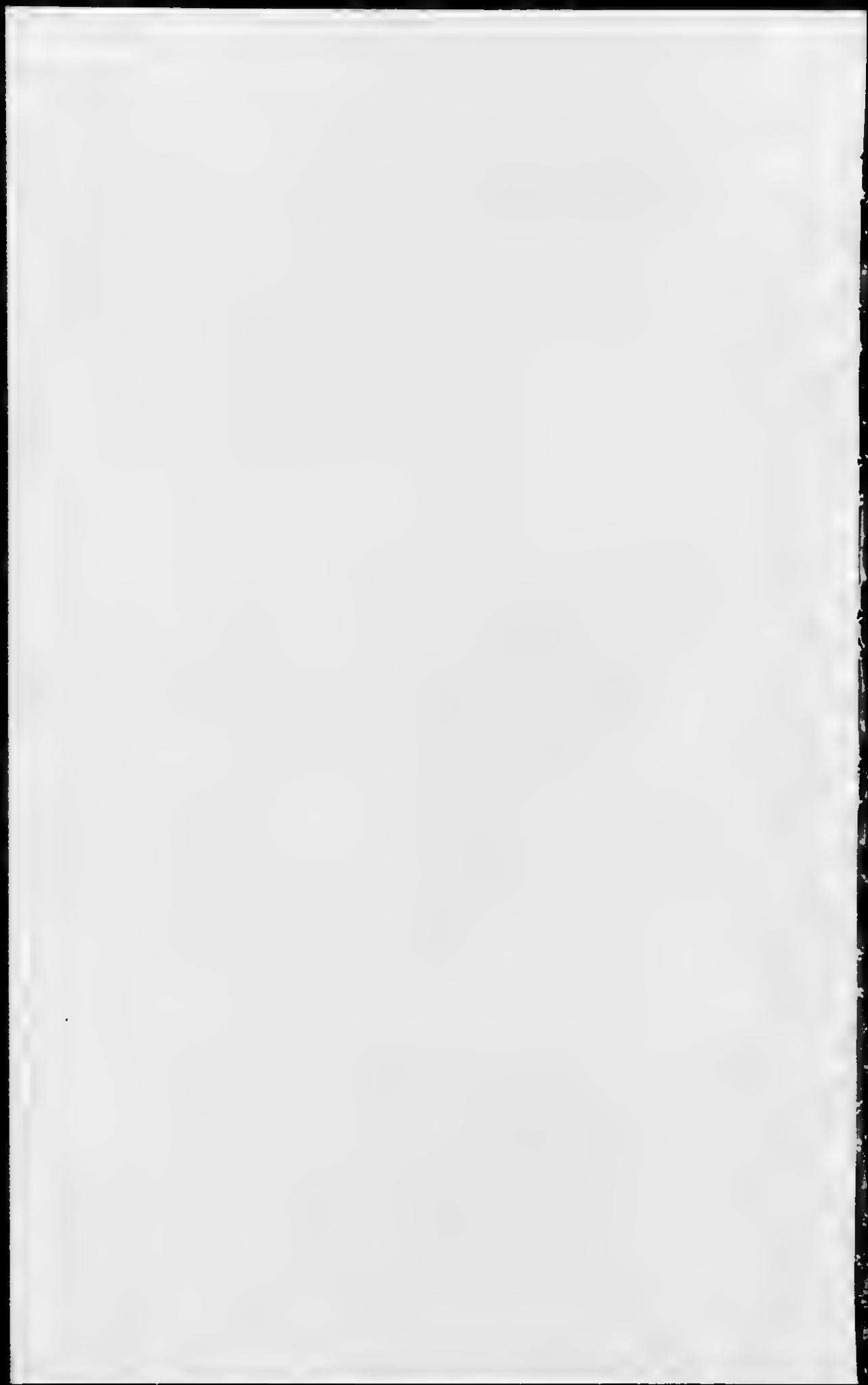
CASES:

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* Cases marked with asterisk chiefly relied upon.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,177

GODFREY P. SCHMIDT, *Appellant*,

v.

JOSEPH S. McCARTHY, SEYMOUR J. SPELLMAN

and

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Appellees*.

Appeal From the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

- I. There was no "wrongful suing out of the attachment" within the meaning of Title 16-501 of the D.C. Code, because appellant showed only that appellees were unsuccessful in the principal suit, an inadequate showing under the language of the statute and under the ruling of this Court. The statute and the ruling of this Court require a showing of wrongfulness to support a claim for damages.

II. Even if the attachment were wrongful, there was no showing of any damage resulting from appellees' attachment. Appellees' attachment was abortive and ineffectual from the outset, because it was inferior to a levy of Internal Revenue Service which was prior in right and in time. Appellant's property was thus detained, not by appellees' attachment but by the Internal Revenue Service levy. In any event, appellant sustained no actual damage, since his money went to pay his indebtedness to Internal Revenue for back taxes.

COUNTERSTATEMENT OF THE CASE

Appellant's Statement of the Case is inadequate and omits certain material facts. Central to the determination of the issues is a clear, complete, and accurate chronology of events.

1. On August 12, 1961, appellant Schmidt filed an action against International Brotherhood of Teamsters etc. (hereinafter called the International) seeking counsel fees for legal services rendered in the case of *Cunningham et al. v. English et al.*, Civil Action No. 2361-57 (U.S.D.C.D.C.). His action was in the form of a motion filed within that suit. [J.A. 3]

2. On May 11, 1962, while the above action of appellant was pending, Internal Revenue Service served a levy upon the International on "all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by" appellant for unpaid taxes in the sum of \$18,072.55. [J.A. 25]

3. At that time (i.e., May 11, 1962) the International had in its possession, in addition to the aforesaid claim for counsel fees, credits of appellant in the amount of \$12,598.26 which the International was holding under an attachment before judgment in an unrelated case, *Smith v. Schmidt*, Civil Action No. 92-61 (U.S.D.C.D.C.). [J.A. 34]

4. On November 8, 1962, while appellant's aforesaid action against the International for counsel fees was still pending, Internal Revenue Service served a second levy upon the International against appellant for unpaid taxes amounting to \$61,965.00. [J.A. 26]

5. On March 15, 1963, the District Court entered an Order in appellant's action against the International awarding appellant counsel fees in the amount of \$60,000.00.

6. On March 22, 1963, appellees (McCarthy and Spellman) filed the instant action against appellant seeking an award of counsel fees in the amount of \$15,000 for services rendered in establishing appellant's right to counsel fee in *Cunningham v. English*. Appellees proceeded against appellant by way of attachment before judgment, serving the attachment against the International. [J.A. 1, 7]

7. On April 3, 1963, the International responded to the Interrogatories served with appellees' attachment, stating that it was indebted to appellant in the amount of \$60,000 pursuant to the Order of the District Court referred to above in Paragraph 5. [J.A. 12]

8. On March 13, 1964, the District Court entered a judgment against appellant in the instant case in the amount of \$15,000, and directed the garnishee (the International) to disburse said amount of appellees McCarthy and Spellman. [J.A. 18] The International, on advice of counsel, failed and refused to disburse any amount to appellees on the ground that "a federal tax lien [i.e., the Internal Revenue Service levies] has priority over an attachment before judgment". [J.A. 29-30]

9. On April 8, 1964, appellant Schmidt noted an appeal from the judgment of the District Court in the instant case [J.A. 33], but in view of the International's refusal to disburse any amount to appellees in satisfaction of their judgment because of the superior Internal Revenue Service

levy, appellant was able to do so without posting a supersedeas bond in support of his appeal.

10. On October 12, 1964, while appellant's appeal in the instant case was pending before this Court, Internal Revenue Service served upon the International two "Final Demand" notices, demanding the surrender of appellant's property subject to the aforesaid levies of May 11, 1962, and November 8, 1962.

11. On December 11, 1964, the International transmitted to Internal Revenue Service the sum of \$27,598.26, representing (in the words of its counsel) "the sum total of funds held at the International Union" for appellant's account; and the International so advised appellant. With respect to the \$15,000 which was the subject of the attachment before judgment in the instant case, the International (through its counsel) took the position that: "Notwithstanding that the attachment before judgment in that case has now been reduced to judgment by an order dated March 13, 1964, I feel satisfied that the Internal Revenue lien was both prior in time and in right." [J.A. 27]

12. On October 3, 1966, this Court reversed the judgment of the District Court in the instant case and remanded it with the direction that judgment be entered for the appellant. [J.A. 19]

13. On April 3, 1967, appellant filed a "Motion for Judgment Against Plaintiffs and Fidelity and Deposit Company of Maryland", seeking costs and damages "by reason of the wrongful suing out of an attachment before judgment". Specifically, for present purposes, appellant sought interest at 6% per annum on \$15,000 from March 22, 1963, to September 26, 1966, in the amount of \$3,150. [J.A. 21-22]¹

¹ Appellant also sought recovery of \$474.60 in assessable costs incurred in the trial and appeal, but this sum has been paid and is not the subject of appeal.

14. On June 12, 1967, the District Court denied appellant's motion, stating in its Memorandum opinion that "defendant has failed to establish that the suing out of the writ of attachment was wrongful within the provisions of Title 16, Section 501(e) of the District of Columbia Code"; and also that "defendant has failed to establish any damages sustained by him because of the detention of his property, since it appears in this proceeding that U.S. tax liens filed with the International Brotherhood of Teamsters were both prior in time and in right to the attachment before judgment herein and, therefore, defendant's funds were not detained and the defendant did not sustain any loss because of the detention of his property by the plaintiffs." [J.A. 31]

15. On June 29, 1967, appellant noted his appeal from that order.

ARGUMENT

The trial court was correct in its ruling. There was no wrongful attachment and, in any event, appellant sustained no damage (loss of interest) because his property was detained, not by appellees' attachment before judgment, but by the levies of Internal Revenue Service which were, as a matter of law, prior in time and in right.

I. There Was No "Wrongful Suing Out of the Attachment" Within the Meaning of Title 16-501, District of Columbia Code

Appellant neither stated nor proved a cause of action in his Motion for Judgment. He stated and proved simply that appellees sued him by way of attachment before judgment and lost their suit when the judgment of the trial court was reversed. His case was thus based on the premise that the failure of appellees to recover in the principal suit, without more, demonstrated the wrongfulness of their attachment and established his entitlement to

damages under the bond. That is not a proper view of the law of the District of Columbia.

Liability under an attachment bond is contractual and depends on the obligations expressly assumed therein and on the obligations imposed by statute which are read into the bond. *C.J.S.*, Attachment, par. 163, at p. 342.

There are two general types of attachment bond statutes. One type is conditioned, in express terms, to pay all damages that defendant may sustain simply in the event plaintiff should fail to recover in the case. There, defendant establishes his right to damages merely by showing that plaintiff failed to recover. *C.J.S.* Attachment, par. 163, at p. 344.

The other type of bond statute provides for damages by reason of the wrongful suing out of the attachment. Under such statutory bond, damages are due if it is found that plaintiff had no reasonable grounds to believe that anything was due him. *C.J.S.* Attachment, par. 163, at p. 344; *Crom v. Henderson*, 175 N.W. 933.

Appellant based his claim on the assumption that the District of Columbia bond is the former type. But the statutory language identifies it as the latter.

Title 16-501, D.C. Code, provides:

"... the plaintiff shall . . . file . . . a bond . . . conditioned to make good to the defendant all costs and damages which he may sustain *by reason of the wrongful suing out of the attachment.*" (Emphasis supplied)

The question is—what is meant by "wrongful". The word itself plainly imports more than a simple failure of plaintiffs to prevail in their suit, for there are many ways a lawsuit can be lost which do not involve what could be considered a "wrongful" act by plaintiffs in suing out the attachment. In the instant suit, plaintiffs prevailed

in the trial court (on summary judgment on the issue of liability), and the decision was reversed, not in any sense because plaintiffs acted wrongfully in bringing the suit, but only because this Court disagreed with the trial court on a complex question of law. Indeed, appellant did not allege and does not claim that plaintiffs acted in any "wrongful" manner in suing out the attachment; his argument is grounded solely on plaintiffs' loss on an issue of law in the appellate court.

The meaning of the statutory word "wrongful" is to be found in the affidavit required of a plaintiff as a condition of proceeding by way of attachment. The statute says plaintiff ". . . shall file an affidavit showing the grounds of his claim and setting forth that plaintiff has a just right to recover what is claimed in his declaration". Title 16-501, D.C. Code.

Relating the affidavit to the bond, the phrase "wrongful suing out of attachment" means not only that plaintiff lost the principal suit but had no reasonable basis for his affidavit; in other words, had no reasonable basis for declaring under oath that he had a "just right to recover". To accept appellant's view that mere loss of the suit, standing alone, establishes the statutory "wrongfulness" of the attachment is in effect to read that word out of the statute.

In the case of *Davis v. Peerless Insurance Company*, 255 F. 2d 534, this Court makes it perfectly clear that, to recover damages, defendant must carry the burden of showing the "wrongfulness" of the attachment. In that case, the Court stated, in pertinent part:

"That Stein's failure of success resulted in a 'wrongful suing out of the attachment', as the term is used in our Code, is not to be doubted. This result is not only recognized in practice over the years in the District of Columbia, but Stein's case was fully tried on the merits with judgment adverse to the claims of the plaintiff-in-attachment. The [trial] court concluded

that the contract and note in suit were illegal and contrary to public policy. That judgment established the wrongfulness of Stein's deprivation to Davis of the full use and enjoyment of his property under attachment and even expressly reserved to Davis the right to pursue his remedy on the attachment bond." [at pp. 537-538]

The last two sentences have been italicized because appellant quotes the first two sentences in his brief [p. 5] but omits the rest of the quotation which is really the heart of the matter. As noted above, this Court said in *Davis v. Peerless*, "That judgment" establishes the wrongfulness of the attachment. What "judgment"? The judgment that the contract and note sued on were illegal and contrary to public policy. These were the factors showing wrongfulness and not simply the loss of the suit, standing alone. This is the only sensible reading of that decision; otherwise, this Court's references to the illegality of the contract and the words, "That judgment" would make no sense.

Indeed, the Court makes this perfectly clear when, in a footnote, it specifically contrasts the ruling in the principal case with one in which a defendant-in-attachment is held not entitled to damages where he fails to prove wrongfulness by showing only that the plaintiffs' attachment suit was dismissed for failure of prosecution.

In footnote 12 in *Davis v. Peerless*, the Court points to *American Surety Co. v. Florida Nat. Bank and Trust Co.*, 5 Cir., 1938, 94 F. 2d 126, to illustrate the contrast. If, as in *American Surety*, dismissal for failure of prosecution does not demonstrate "wrongfulness" in the statutory sense, then *a fortiori*, present appellees who prevailed below and were simply reversed on a question of law on appeal have not been shown to be guilty of "wrongful suing out of the attachment" within the meaning of the statute.

II. Even Assuming the Attachment Was Wrongful, Appellant Is Not Entitled to Damages

As the undisputed facts show, the two Internal Revenue Service levies against appellant were served upon the International in May and November 1962, prior to appellees' attachment before judgment which was served in March of 1963. At the time the levies were served, there was pending before the District Court appellant's suit against the International for counsel fees for legal services rendered in *Cunningham v. English*.

The Final Demand notice respecting these levies refers to Section 6332 of Internal Revenue Code of 1954 which provides that:

"Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process."

Section 6331(a) and (b) which define the reach of levies use the same terms: "all property and rights to property".

Although his argument is not entirely clear, appellant appears to contend that the Internal Revenue Service levies did not cover or attach his claim for counsel fees against the International because that claim, though pending in District Court at the time the levies were served, had not yet been reduced to judgment. Such a levy "was not a continuing levy"—appellant argues at page 8—and "only covered that which was owed by the International to the actual date of service" of the levy. In effect, appellant is contending that an unliquidated claim in litigation is not encompassed by the statutory phrase "all property or

rights to property" which defines the ambit of IRS levy. In this, he is wrong.

In *United States v. Hubbell*, 323 F. 2d, 197 (5th 1963), the Court considered the question of whether a claim by a subcontractor against the building owner for duress was reached and attached by an Internal Revenue Service levy.

The Court said:

"The controlling question therefore is whether Lewis' right of action against Housing Authority amounted to 'property' or 'rights to property' within 26 USCA 3670 (IRC 1939)."

Holding that the levy reached and held the claim for the benefit of IRS, the Court said:

"Lewis claim against Housing Authority was not contingent merely because it would take a lawsuit to reduce it to judgment or collect it. It was, perhaps, uncertain, but not subject to any infirmity which would prevent the attachment of the lien. The real issue in this case . . . is whether the lien attaches to an unliquidated claim sounding in tort . . . We see no reason . . . why a tort claim is not 'property' or 'rights to property' just as e.g. an unliquidated contract claim is so considered."²

Appellant points to Section 6331 (c) dealing with successive seizures, apparently arguing from that section that successive levies would not be necessary if a levy had a continuing effect. But appellant is confusing the present issue of the scope of "property or rights to property" with the problem of after-acquired property. Thus, successive levies are for the purpose of reaching-after-acquired property such as future wages dependent upon performance of future services, since future earnings are not reached by a levy. *U. S. v. Long Island Drug Company*, 115 F. 2d 983.

² To the same effect: *Kirby v. U.S.*, 329 F. 2d 755; *Greenup v. U.S.*, 239 F. Supp. 330; *In re Walton's Estate*, 20 App. Div. 2d 386, 247 NYS 2d 21.

It is plain, therefore, that the Internal Revenue Service levies were prior in time to appellees' attachment before judgment and were effective in attaching appellant's pending claim against the International for counsel fees.

It is also plain that these levies were prior in right, for the Supreme Court has ruled that such a lien is senior even to a *prior* attachment before judgment lien where the prior attachment lienor has not reduced his claim to judgment at the time of the tax lien. *U. S. v. Security Trust Company*, 340 U.S. 47; *U. S. v. Acri*, 348 U.S. 211; *U. S. v. Liverpool and London Insurance Company*, 348 U.S. 247.

In light of these principles, the International took the view that the IRS tax lien was superior to appellees' attachment lien, and notwithstanding the judgment of the trial court condemning the attached funds in favor of appellees following judgment for appellees in the trial court, refused to disburse any funds to appellees and instead transmitted same to Internal Revenue Service on December 11, 1964.

Thus, appellant's funds were detained, not by virtue of appellees' attachment before judgment, but by the superior tax liens of Internal Revenue Service. Appellant cannot therefore claim damages against appellees, for it is the established law of this jurisdiction that, under an attachment bond, appellant "... is limited to ... such costs and damages as [he] can show were sustained because of the detention of his property". *Davis v. Peerless Ins. Co.*, 255 F. 2d 534.

Appellees' attachment was wholly ineffectual from the very start. In these circumstances, it cannot be said that appellant sustained any loss because of the detention of his property *by appellees*. Even had appellees won on appeal, they could not have collected a cent under their attachment; the money had been disbursed to the Internal Revenue Service pursuant to its superior liens.

Finally, it may be noted that in no event can it be said that appellant suffered any actual damage, for the money went to pay his pre-existing delinquent taxes.³

Respectfully submitted,

SEYMOUR J. SPELLMAN

JOSEPH S. McCARTHY

Appellees, Pro Se

*and as Counsel for Fidelity and
Deposit Company of Maryland*

1701 K Street, N. W.

Washington, D. C. 20006

Telephone 737-6929

³ Appellant's claim for interest up to September 1966 is baffling, since the money was transmitted to Internal Revenue in December of 1964. Even if appellant were to contend that he did not owe the taxes (which he does not), he would be entitled to a refund of his money with interest at 6% per annum from Internal Revenue.

PETITION FOR REHEARING
BY THE COURT EN BANC

In the
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT
*United States Court of Appeals
for the District of Columbia Circuit*

RECEIVED

MAY 21 1968

CLERK OF THE UNITED
STATES COURT OF APPEALS

FILED MAY 21 1968
No. 21,177

F.athan J. Paulson
CLERK

GODFREY P. SCHMIDT,

Appellant,

v.

JOSEPH S. McCARTHY and
SEYMOUR J. SPELMAN,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING
BY THE COURT EN BANC

Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Attorney for Appellant



In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,177

GODFREY P. SCHMIDT.

Appellant.

v.

JOSEPH S. McCARTHY and
SEYMOUR J. SPELMAN,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING
BY THE COURT EN BANC

The appellant, Godfrey P. Schmidt, moves the Court *en banc* to grant a rehearing, and for grounds therefor states that in affirming the judgment of the United States District Court for the District of Columbia it erred in the following respects:

1. The opinion of the Court relies upon an alleged levy

for unpaid taxes of appellant served by the Internal Revenue Service upon the garnishee prior to appellees' attachment.

2. The record herein discloses that no levy was ever made by the Internal Revenue Service upon the fund involved herein and that it was held only under the attachment sued out by appellees.

3. The last levy made by the Internal Revenue Service was dated November 8, 1962, at which time the record discloses the garnishee had no assets belonging to appellant.

STATEMENT OF FACTS

On March 22, 1963, Spelman and McCarthy filed a complaint against Schmidt, in Civil Action No. 772-63, for attorneys' fees and costs growing out of their alleged legal services in the case of *Milone v. English*, this Court No. 16348, which they contended was beneficial to Schmidt in that he would not have received the fees allowed by Judge Matthews had they not reversed the action of Judge Letts in that case.

At the time of the filing of the complaint they also filed an attachment before judgment attaching \$15,000.00 which was due Schmidt by reason of a judgment in his favor entered by Judge Matthews on March 15, 1963, in the case of *Cunningham v. English, et al.*, being Civil Action No. 1361-57 (JA 38). The attachment was served on the Teamsters on March 22, 1963, and its answer was filed on April 3, 1963, in which it admitted that it had \$60,000.00 in its possession under the order of Judge Matthews on March 15, 1963.

The answer further contained a statement that it was withholding the sum of \$12,598.26 pursuant to an attachment in the case of *Smith v. Schmidt*, Civil Action No. 92-61. This action was commenced January 9, 1961, by one Smith who was represented by Spelman, and this sum was held by the Teamsters subject to a levy by the Internal Revenue Service dated November 18, 1962 (JA 27-29).

The action of Spelman and McCarthy, Civil Action No. 772-63, ended in a judgment in favor of *Spelman and McCarthy v. Schmidt*, and a judgment of condemnation of the sum of \$15,000.00 was entered therein. The judgment in favor of the Appellees was reversed by this Court in No. 18617, with directions to enter judgment in favor of Schmidt, which was entered on November 23, 1966 (JA 20).

A motion for judgment was filed in the same cause, Civil Action No. 772-63, by *Schmidt v. Spelman and McCarthy*, for interest on the \$15,000.00 from March 22, 1963, until September 26, 1966, at the rate of 6% per annum, or \$3,150.00, and with costs of the appeal, growing out of the wrongful attachment made by Spelman and McCarthy (JA 21-22).

ARGUMENT

The record in this cause contains exhibit No. 1 (JA 25), which discloses a levy which was made on May 11, 1962, and titled "final demand" and dated October 12, 1964, and the following sentence is contained in the last paragraph of exhibit No. 1:

"Demand is again made for the amount set forth in the notice of levy, \$18,072.55, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served." (Emphasis supplied)

There is also contained in the record exhibit No. 2 (JA 26), which also was a final demand, dated October 12, 1964, and referring to a levy dated November 8, 1962, and which contains in the last paragraph thereof the following:

"Demand is again made for the amount set forth in the notice of levy, \$61,965.00, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served." (Emphasis supplied)

The record further contains the answer of the garnishee to the attachment before judgment issued by appellees which appears on page 12 of the record, and contains, in part, the following:

"Answer: Godfrey P. Schmidt: Pursuant to an order entered by Hon. Burnita Shelton Matthews on March 15, 1963 the International Brotherhood of Teamsters is indebted to Mr. Schmidt in the amount of \$60,000.00."

The record also contains a letter known as Exhibit No. 3, from Raymond W. Bergan to appellant (JA 27), in which he refers to a levy on the sum of \$12,598.16, and then in the third paragraph of the letter he refers to the remaining amount representing funds retained pursuant to an attachment before judgment in the case of *McCarthy v. Spelman* which covers the \$15,000.00 in question. There is nothing stated therein covering a lien or levy by the Internal Revenue Service on this fund.

The same factual situation is contained in Bergan's letter to the District Director of Internal Revenue under date of March 26, 1964 (JA 29).

The notation in the levy is very plain and covers only that which is owed at the time the levy is made. It does not cover in any way after acquired property. The authority of the Internal Revenue Service to levy is contained in Section 6331 of Title 26 of the Internal Revenue Code and if such levy or lien is not sufficient to take care of the amount due the Internal Revenue Service it has a right under 6331(c) to make additional levies until such time as it receives or obtains sufficient funds to take care of the tax due.

Section 6331(b) contains, among other things, the following:

"A levy shall extend only to property possessed and obligations existing at the time thereof."

This statement is, in effect, similar to the wording contained in the levy as previously set forth herein.

CONCLUSION

It is respectfully submitted that there is nothing in the record before this Court to sustain the statement that there was a levy of any kind by the Internal Revenue Service against the \$15,000.00 which was attached before judgment by appellees, and, therefore, nothing to sustain the judgment of this Court affirming the judgment of the United States District Court for the District of Columbia and that the petition for rehearing by the Court *en banc* should be granted.

Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
Attorney for Appellant

CERTIFICATE OF COUNSEL

I, Cornelius H. Doherty, attorney for appellant herein, hereby certify that, in my opinion, the grounds set forth in the petition for a rehearing are substantial and the petition is filed in good faith and not for the purpose of delay.

Cornelius H. Doherty

ANSWER TO PETITION FOR REHEARING EN BANC

In the
United States Court of Appeals
for the District of Columbia Circuit

No. 21,177

GODFREY P. SCHMIDT,

Appellant,

v.

JOSEPH S. McCARTHY and
SEYMOUR J. SPELMAN,

Appellees.

Appeal from the United States District Court
for the District of Columbia

Seymour J. Spelman
Joseph S. McCarthy
Appellees, Pro Se
and as Counsel for
Fidelity and Deposit
Company of Maryland

May 31, 1968

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GODFREY P. SCHMIDT :
Appellant :
v. : No. 21,177
JOSEPH S. McCARTHY and :
SEYMOUR J. SPELMAN :
Appellees :

ANSWER TO PETITION FOR REHEARING
BY THE COURT EN BANC

Appellant seeks rehearing on the ground that this Court erred in finding that the property in question was subject to a superior lien for unpaid taxes served on the garnishee prior to appellees' attachment. This argument is simply a rehash of the argument made in the briefs and in oral argument which this Court considered and rejected.

Once again, in arguing that the garnishee had no property or rights to property belonging to appellant at the time the Internal Revenue Service levy for unpaid taxes was served, appellant simply ignores (as he did in his original brief) the critical and decisive fact that, when that tax levy was served, appellant had an unliquidated claim for legal fees against garnishee which was then in litigation. Such a claim is "property or rights to

property" within the meaning of the levy provision of the Internal Revenue Code and therefore subject to the statutory levy. United States v. Hubbell, 323 F.2d 197 (5th 1963) Thereafter, this claim was reduced to judgment and the garnishee transmitted the money to Internal Revenue Service, as required by the levy.

All of this was thoroughly briefed and argued, and therefore no rehearing is warranted. This Court committed no factual error; it simply relied upon a critical fact which appellant has chosen to ignore throughout these proceedings.

Respectfully submitted,

SEYMOUR J. SPELMAN
JOSEPH S. McCARTHY
Appellees, Pro Se
and as Counsel for
Fidelity and Deposit
Company of Maryland
1701 K Street, N. W.
Washington, D. C. 20006
Telephone 737-6929

